STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
V	No. 255580 Monroe Circuit Court
RUDY RAMONEZ VALDEZ, Defendant-Appellant.	LC No. 03-032957-FC

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of life for the first-degree CSC conviction, and ten to fifteen years for the second-degree CSC conviction. He appeals by right. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

I. Underlying Facts

Defendant was convicted of sexually assaulting his stepdaughter, aged twelve at the time of trial. In 1996, the victim's mother married defendant. After the marriage, the victim, along with her mother and her brother, BS, aged fourteen at the time of trial, shared a home with defendant and, at times, his three daughters, Nicole Valdez, Brandy Valdez, and Maria Valdez. In late 1996, the victim's mother and defendant had a daughter, JV.

In 1998, the victim's mother, a nurse, began working from 7:00 p.m. until 7:00 a.m., three days a week, leaving defendant to care for the victim, BS, and JV. According to the victim, defendant sexually abused her on numerous occasions while her mother was at work. The victim testified that, beginning in 1998, when she was six years old, defendant began touching her breasts and "butt" "over her clothes" about "once every month or so, or once every week." She indicated that defendant warned her not to tell anyone because her mother would "go crazy," he would hurt her family, and her family would not believe her.

The victim testified that, beginning in 2001, when she was about eight years old, defendant started "doing other things." According to the victim, one to three times a week, while her mother was at work, she and defendant would go into defendant's bedroom. After removing her clothes and his shorts, defendant would kiss her body, digitally penetrate her, and put his

penis in her vagina, her anus, or her mouth. The victim indicated that, after "slimy" "stuff" came out of defendant's penis, he would wash off in the bathroom and direct her to do the same. The victim's mother testified that it was defendant's practice to "always get up and clean himself off afterwards." The victim noted that, immediately after the incidents, it would "burn" when she urinated. According to the victim, the majority of the sexual incidents occurred in defendant's bedroom while the other children were asleep or otherwise occupied.

BS testified that when their mother was at work, the victim and defendant usually went into defendant's bedroom while he and JV stayed in the family room. BS explained that when they were all in the family room, defendant would stand up first, the victim would then stand up, and the two would go into defendant's room. The victim's mother testified that, when she would return home from work, she often found the victim in her and defendant's bed. The victim's mother also testified that before the allegations were revealed, the victim often complained of stomach aches, headaches, and, on one occasion, of having "a little" bleeding from her vaginal area.

The victim testified that in exchange for the sexual acts, defendant would help her with her chores and buy her candy or other treats. The alleged incidents ended in 2003, after the then eleven-year-old victim revealed them to a camp counselor while they were sharing details about their "secret lives." The victim indicated that she was afraid that her then six-year-old sister was in danger of being abused by defendant. The victim's mother testified that when she questioned defendant about the victim's allegations, he said: "You have every right to say what you're saying to me." In response to her question of "why," defendant said that he would tell her later.

Defendant testified on his own behalf and denied ever touching the victim in a sexual manner. He admitted that, occasionally, the victim joined him in his room to watch movies, and that, when she was seven years old, he slapped her bottom. He indicated that, although he apologized to his adult daughters for what was occurring in their family, he never admitted that he had sexually abused the victim.

II. Improper Expert Opinion Testimony

Defendant first contends that he was denied a fair trial when Jennifer Devivo, who was qualified as an expert in child sexual abuse and was also the victim's therapist, implicitly vouched for the victim's veracity. We disagree.

Defendant did not object to Devivo's testimony below. Therefore, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

During direct examination, the prosecutor primarily asked Devivo about the general behavior of child victims of sexual abuse. The prosecutor also asked: "What do you think the outlook is for, for [the victim], in terms of therapy?" In response, Devivo testified regarding the victim's progress in therapy, and also stated the following, which defendant claims was an improper expert opinion regarding the victim's veracity:

> Um, obviously the fact that she's in this progress and has, um, disclosed something like this, shows that *she obviously is a brave little kid* anyway. Um,

> and that comes through in her therapy. I thinks [sic] *she's going to do really well eventually*, but I think this is a long road. *No one ever gets over being sexually abused*, they just learn to live with it in new ways. [Emphasis added.]

In child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857, amended 450 Mich 1212 (1995). Even an indirect reference may contravene these prohibitions because "the jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id.* at 376.

Although, through the challenged statements, Devivo may have implicitly vouched for the victim's veracity, reversal is not warranted on the basis of this unpreserved issue. The challenged testimony was a relatively small portion of Devivo's testimony. Devivo properly testified at length regarding the general behavior of sexually abused children, much of which was not inconsistent with the victim's behavior.[1] For example, Devivo testified that it is not unusual for young victims of sexual abuse not to immediately disclose the abuse, and that victims usually provide more details when subsequently telling the story. Also, Dr. Randall Schlievert, an expert in child sexual abuse, testified that the victim's normal physical examination is not inconsistent with sexual abuse, and that the victim's "disclosures are suggestive of a sexually abused child."

Additionally, there was other compelling unchallenged evidence, including that of defendant's own two adult daughters. Defendant's twenty-one-year-old daughter, Brandy, testified that in response to her questions about the victim's allegations, defendant "cried a lot," and stated that he was sorry "for what he had done to the family." When Brandy asked defendant "how long was it going on," he replied that "it didn't matter, that one time was too many times." On cross-examination, Brandy indicated that although defendant did not specifically admit to the victim's allegations, he stated that he was "sorry for all that [he had] done to [the victim], [he's] sorry for what [he had] done to this family." Upon further questioning, Brandy indicated that defendant "specifically said" that he was sorry for what he had done to the victim. Defendant's twenty-year-old daughter, Maria, testified that, when the allegations were first made, defendant claimed that "he didn't know what was going on." However, when defendant and Maria later talked, defendant told her that "he was sorry for what had happened, and he hoped that one day [they] would all forgive him for everything that was going on, and that one [sic], hopefully God would forgive him too."

Moreover, the trial court instructed the jurors of the proper use of Devivo's testimony, and that her testimony could not be used to show that the charged crime was committed, or be

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[1] In child sexual abuse cases, "(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Peterson, supra* at 352-353.

considered Devivo's opinion that the victim told the truth.[2] "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). In sum, even if plain error occurred, defendant has not demonstrated that his substantial rights were affected. *Carines*, *supra*. Defendant is not entitled to a new trial with respect to this issue.

III. The Victim's Mother's Testimony

Defendant contends that errors warranting reversal occurred when the prosecutor improperly elicited during direct examination of the victim's mother both hearsay and the victim's mother's opinion that the victim was truthful. We disagree.

A. Challenged Testimony

The victim's mother testified that she asked the victim to describe defendant's penis to determine what "really happened." She indicated that, in response, the victim took a piece of paper, wrapped it around two fingers, and explained that when defendant's penis "got hard," the skin would "pull back," and "when he was done," the skin would return. The victim's mother testified that defendant had an uncircumcised penis, and that the victim's description was accurate. She also testified that the victim indicated that, after defendant ejaculated, he would clean himself off, which she knew was defendant's "practice." The victim's mother stated that based on the victim's description of defendant's penis and his behavior, she knew the victim was "telling [her] the truth."

B. Hearsay - Statement of Prior Identification

With regard to the challenged testimony, defendant first contends that the trial court abused its discretion by admitting the victim's statements to her mother describing defendant's penis as statements of identification under MRE 801(d)(1)(C) as an exception to the rule against admitting hearsay. See MRE 801; MRE 802. We review the trial court's decision to admit evidence for an abuse of discretion, *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001), and will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights, MRE 103(a).

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[2] The court instructed the jury as follows:

> You have heard uh [sic], an opinion from Jennifer Devivo about the behavior of sexually abused children. You should consider that evidence only for the limited purpose of deciding whether you believe the victim, [the victim's] acts and words after the alleged crime were consistent with those of sexually abused children. That evidence cannot be used to show that the crime charged here was committed, or that the defendant committed it. Nor can it be considered an opinion by Jennifer Devivo, that the complainant is telling the truth.

We find merit to defendant's claim that the victim's statement to her mother describing defendant's penis did not qualify as a statement of identification under MRE 801(d)(1)(C). In *People v Sykes*, 229 Mich App 254, 273-274; 582 NW2d 197 (1998), this Court held that "identification" within the meaning MRE 801(d)(1)(C) did not extend to include out-of-court descriptive statements leading the hearer of the statements to conclude the declarant's description identified a particular person. But defendant bears the burden of demonstrating that a preserved nonconstitutional error merits reversal because it more probably than not was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Given the other unchallenged evidence against defendant, it is highly improbable that the outcome would have been different had the trial court precluded the challenged testimony. In her testimony, the eleven-year-old victim described defendant's penis, and it was undisputed that defendant was uncircumcised. Thus, the challenged evidence was cumulative of other properly admitted evidence. Therefore, even if the trial court abused its discretion by admitting the challenged testimony, defendant cannot affirmatively establish that it is more probable than not that the alleged error was outcome determinative.

C. Opinion Evidence

We also reject defendant's claim that error warranting reversal occurred when the victim's mother improperly testified that the victim was "telling [her] the truth," contrary to MRE 608(a). Because defendant did not object to the testimony below, this Court reviews this unpreserved claim for plain error affecting substantial rights. *Carines, supra*.

MRE 608(a) provides, in pertinent part:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Even if the challenged testimony did not meet the requirements of MRE 608(a), reversal is not warranted on the basis of this unpreserved issue. *Carines, supra*. The victim's mother's opinion that the victim told her the truth was based on two factors: (1) the victim's description of defendant's penis, and (2) the victim's description of defendant's behavior of immediately cleaning himself after sex. As previously indicated, the victim herself described defendant's uncircumcised penis, as well as his post-ejaculation cleaning practices. The victim's mother's testimony that defendant's penis was uncircumcised and that it was defendant's practice to immediately wash up was not improper. Thus, although the victim's mother testified that she believed the victim, the facts on which she relied were already plainly before the jury. Further, contrary to defendant's suggestion, it is highly improbable that the jurors decided the case on the basis that a mother believed her child.

Additionally, the victim testified in detail about the alleged incidents. Also, the victim's brother, BS, testified and described how defendant and the victim would regularly leave the family room together and go into defendant's room, while he and their younger sister, JV, remained in the family room. Also, as previously indicated, defendant made incriminating

comments to his adult daughters regarding the incidents. In short, there was sufficiently compelling, admissible evidence to render the admission of the challenged testimony harmless. Consequently, defendant cannot demonstrate plain error affecting his substantial rights and, therefore, reversal is not warranted on the basis of this issue.

IV. Hearsay - Statements Made for Medical Treatment or Diagnosis

Next, defendant contends that he was denied a fair trial when Dr. Schlievert testified regarding statements the victim made to his office social worker, because the statements constituted inadmissible hearsay, inasmuch as they were not made for purposes of medical treatment or diagnosis under MRE 803(4), but merely for investigative purposes. We disagree.

Because defendant did not object to this testimony below, this Court reviews this unpreserved claim for plain error affecting his substantial rights. *Carines*, *supra*.

MRE 803(4), a hearsay exception, allows the admission of "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history . . . insofar as reasonably necessary to such diagnosis and treatment." "Under MRE 803(4), the declarant must have the self-motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient." *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

Although, in his testimony, Dr. Schlievert indicated that his office only obtains information that "impact[s] [their] diagnosis, [their] treatment plan," a review of the record supports defendant's claim that the victim's statements were elicited for investigative purposes not for medical treatment or diagnosis within the meaning of MRE 803(4). It is undisputed that the investigating police officer initiated Dr. Schlievert's examination, approximately one month after the victim first reported the incidents, that the victim had been examined after disclosing the incidents by a different physician, and that the referral to Dr. Schlievert was for an evaluation for sexual abuse. See, e.g., *McElhaney*, *supra* at 281 ("[i]f the prosecutor scheduled the medical examination, it might indicate that the examination was not for the purposes of medical treatment.") Nonetheless, even if Dr. Schlievert's testimony regarding the victim's statements constituted plain error, the error was harmless because the challenged testimony was cumulative of the victim's own trial testimony, where she described, in detail, the alleged sexual acts and identified defendant as the perpetrator. *Id*. at 283; *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Thus, defendant cannot establish plain error affecting his substantial rights and, therefore, reversal is not warranted on the basis of this unpreserved claim. *Carines*, *supra*.

V. Prosecutorial Misconduct

Next, defendant contends that he was denied a fair trial by two instances of prosecutorial misconduct. We disagree. Because defendant failed to object to the prosecutor's conduct below, this Court reviews his unpreserved claims for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

A. Improper Argument

First, defendant claims that the prosecutor made an improper argument when she urged the jury to find the victim credible because several other witnesses believed her.

Defendant has not demonstrated plain error affecting his substantial rights. Before making the challenged comments, the prosecutor told the jurors that they were to evaluate and judge the witnesses' credibility and the evidence, and she discussed the witnesses and the evidence at length. In making the challenged remarks, the prosecutor was in the midst of discussing "corroboration" and urged the jurors to consider the numerous witnesses to whom the victim had told her story including trained personnel, and argued that, given the victim's youth and lack of sophistication at that age, it is unlikely that she could have "fooled" all of those individuals. In making the argument, the prosecutor also stated:

> The most important corroboration, well, [the victim's] testimony by far, is the most important thing, and her account, and some of the details that just sort of creep you out are [sic] the most important thing.

Viewed in context, the prosecutor's argument that, based on the evidence, the victim's claims were believable was not improper. A prosecutor is free to argue reasonable inferences arising from the evidence as they relate to her theory of the case, including arguing from the facts that a witness is credible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant also generally claims that in making the challenged comments, the prosecutor engaged in misconduct by proffering prejudicial and inadmissible evidence. Contrary to defendant's suggestion, although a prosecutor may not argue the effect of testimony that was not entered into evidence at trial, she may argue reasonable inferences from the evidence that was admitted. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). For the same reason, we reject defendant's claim that because no witness testified that the victim could not have "fooled" him or her, the prosecutor improperly argued facts not in evidence. The prosecutor's argument that it is unlikely that the victim could have "fooled" these trained individuals was a fair inference from the evidence. A prosecutor may use "hard language" when the evidence supports it, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

To the extent the prosecutor's remarks were improper, they involved only a portion of her closing and rebuttal argument and were not so inflammatory that defendant was prejudiced. Any prejudice that may have resulted could have been cured by a timely instruction. *Watson, supra* at 586. Indeed, the trial court instructed the jurors that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any possible prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Accordingly, this claim does not warrant reversal.

B. Denigration of Defendant

We also reject defendant's assertion that the prosecutor impermissibly denigrated his character during closing argument when she argued that defendant had a motive to lie, because he "has a special reason to lie – to avoid potential circumstances for the crime he's committed."

Defendant contends that the prosecutor continued the improper argument during rebuttal argument, when she stated:

> [Defendant] has every right to defend himself. But my point is, when you look at who has a reason to lie here, everyone agrees, [the victim] has no reason. And even though [defendant] took an oath today, and told you he didn't do it, he has a reason to lie. He's the one who will suffer some consequences here.

Although a prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks," *id*. at 283, the challenged remarks were responsive to the evidence produced at trial, including defendant's own testimony, and were plainly focused on refuting defense counsel's assertions made during trial and closing argument that the victim was not credible. In making the challenged remarks, the prosecutor urged the jurors to evaluate the evidence, consider that the victim had no motive to lie about something that would cause such adversity, and that defendant "has a special reason to lie," i.e., to avoid being convicted. A prosecutor may argue that a testifying defendant is not worthy of belief, and is not required to phrase arguments and inferences in the blandest possible terms. *Launsburry*, *supra* at 361. Consequently, this claim does not warrant reversal.

VI. Cumulative Error

We reject defendant's claim that the cumulative effect of the errors raised in parts II – V deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

VII. Ineffective Assistance of Counsel

We also reject defendant's claim that defense counsel was ineffective for failing to object to the unpreserved claims of errors raised in parts II – V. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In light of our conclusion that the claimed errors in parts II – V did not affect defendant's substantial rights, i.e., were not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Id*. Therefore, he cannot establish a claim of ineffective assistance of counsel. Defendant is not entitled to a new trial.

VIII. Sentence

A. Upward Departure

We agree with defendant that he is entitled to resentencing. Under the sentencing guidelines statute, the trial court must impose a minimum sentence in accordance with the appropriate guidelines range, MCL 769.34(2), and may not depart from the recommended range unless it "has a substantial and compelling reason for [the] departure and states on the record the reasons for departure." MCL 769.34(3). The sentencing guidelines range for defendant's first-degree CSC conviction was 135 to 225 months, and the guidelines range for his second-degree CSC conviction was 43 to 86 months. When imposing minimum terms of life imprisonment and 120 months, respectively, the trial court exceeded the guidelines ranges without articulating any substantial and compelling reason for doing so. Therefore, as the prosecution concedes, defendant must be resentenced. MCL 769.34(11); *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003). On remand, the trial court may impose a minimum sentence within the appropriate guidelines range, or a minimum sentence that exceeds the guidelines range if it finds on the record "a substantial and compelling reason" to do so. MCL 769.34(3).

B. OV 13

Defendant also challenges his score of fifty points for offense variable (OV) 13 (pattern of criminal behavior), arguing that the court violated the explicit guidelines instructions by considering the same conduct in both OV 11 and OV 13. Because defendant did not raise this issue at or before sentencing, in a motion for resentencing, or in a motion to remand, he has not preserved it for appeal. MCR 6.429(C); MCL 769.34(10); *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant acknowledges that our review is limited to whether plain error affected his substantial rights. *Id*. The prosecutor concedes plain error occurred here and that remand for resentencing is the appropriate remedy.

Defendant does not challenge his score of fifty points for OV 11, which provides that fifty points should be scored if "two or more criminal sexual penetrations occurred." MCL 777.41(1)(a). The instructions for OV 11 provide that "all sexual penetrations of the victim by the offender arising out of the sentencing offense" other than the conviction offense should be scored. MCL 777.41(2)(a), (2)(c); *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003). Where the penetrations occur at the same place, under the same set of circumstances, and during the same course of conduct, the penetrations unambiguously fall within the scope of OV 11. *Id*. at 674 n 16 (finding dicta in *People v Mutchie*, 251 Mich App 273, 276-277; 650 NW2d 733 (2002) persuasive). Here, the Information charged defendant with one count of first-degree CSC, occurring between August 20, 1998 and February 5, 2003. Only one sexual penetration was required to form the basis of the first-degree CSC conviction, but the victim testified that defendant repeatedly penetrated her during the relevant time period. Therefore, the trial court properly assigned defendant a score of fifty points for OV 11.

But the trial court also assigned defendant a score of fifty points for OV 13. MCL 777.43(1)(a) provides that fifty points are to be scored for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person . . . less than 13 years of age." Defendant asserts, and the prosecutor agrees, plain error occurred because the guidelines instructions clearly state, "[e]xcept for offenses related to membership in

an organized criminal group, do not score conduct scored in offense variable 11 or 12." MCL 777.43(2)(c).[3] Consequently, we conclude that the trial court plainly erred when it assessed points for the same conduct in both OV 11 and OV 13. MCL 777.43(2)(c).

Defendant concedes, however, that the trial court could properly score twenty-five points for OV 13 because "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The victim's testimony established that defendant committed numerous acts of second-degree CSC, not involving penetration, over a period of nearly six years. A crime need not have resulted in a conviction in order to be counted in the scoring of OV 13. MCL 777.43(2)(a). Therefore, on remand, the trial court may score only twenty-five points for OV 13.

C. Jail Credit

Defendant's final claim is that he was awarded insufficient credit for time spent in jail before sentencing. MCL 769.11b. Defendant argues he was jailed from the day of his arrest on July 14, 2003 to July 22, 2003. But the trial court file reflects defendant was granted a personal recognizance bond with conditions on the same day he was arrested. Because we are remanding for resentencing, we decline to address this claim.

We affirm in part and remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray

[3] It is undisputed that the exception does not apply to this case.